

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9**

In the Matter of:

MIKE-SELL'S POTATO CHIP CO.

and

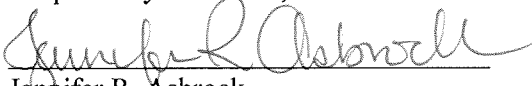
Case No. 09-CA-184215

GENERAL TRUCK DRIVERS, WAREHOUSEMEN,
HELPERS, SALES AND SERVICE, AND CASINO
EMPLOYEES, TEAMSTERS LOCAL UNION NO. 957

**RESPONDENT'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL AUTHORITY IN
SUPPORT OF RESPONDENT'S EXCEPTIONS TO THE DECISION AND RECOMMENDED
ORDER OF ADMINISTRATIVE LAW JUDGE ANDREW S. GOLLIN**

Pursuant to National Labor Relations Board Rule § 102.46, Respondent Mike-sell's Potato Chip Co. ("Mike-sell's" or "Company") hereby moves for leave to file supplemental authority in support of its Exceptions to the Decision and Recommended Order of Administrative Law Judge ("ALJ") Andrew S. Gollin. As explained more fully in the Brief in Support filed contemporaneously herewith, the recent decision in *Raytheon Network Centric Systems*, 385 NLRB No. 161 (December 15, 2017) directly undercuts the ALJ's Decision and supports the arguments set forth in Section IV(A)(3) of the Company's Brief in Support of Exceptions.¹

Respectfully submitted,



Jennifer R. Asbrock

jasbrock@fbtlaw.com

FROST BROWN TODD LLC

400 West Market Street, 32nd Floor

Louisville, KY 40202-3363

Telephone: (502) 589-5400

Facsimile: (502) 581-1087

Counsel for Respondent Mike-sell's Potato Chip Co.

¹ Mike-sell's adamantly maintains its position that the elimination of individual routes—like the closure of discrete business units—is not a mandatory subject of bargaining. (See Exceptions Brief, at Section IV(A)(1-2).) Nevertheless, the Company seeks leave to supplement its alternative argument that Mike-sell's made no "material, substantial, and significant change" to drivers' terms and conditions of employment by selling the four routes. (See Exceptions Brief, at Section IV(A)(3).)


CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2018, the foregoing was served via electronic filing through the National Labor Relations Board website (www.nlr.gov) to the National Labor Relations Board's Office of the Executive Secretary, located at 1015 Half Street SE, Washington, DC 20570-0001, with additional service copies sent as follows:

Garey E. Lindsay, Regional Director
Linda Finch, Counsel for the General Counsel
National Labor Relations Board Region 9
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271
(via email at Linda.Finch@nlrb.gov)

John R. Doll, Counsel for Charging Party
c/o Doll, Jansen, & Ford
111 W. First St., Suite 1100
Dayton, Ohio 45402-1156
(via email at jdoll@djflawfirm.com)

Office of the General Counsel
c/o National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001
(via U.S. mail)



Jennifer R. Asbrock
Counsel for Respondent Mike-sell's Potato Chip Co.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of:

MIKE-SELL'S POTATO CHIP CO.

and

Case No. 09-CA-184215

GENERAL TRUCK DRIVERS, WAREHOUSEMEN,
HELPERS, SALES AND SERVICE, AND CASINO
EMPLOYEES, TEAMSTERS LOCAL UNION NO. 957

**BRIEF IN SUPPORT OF RESPONDENT'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL
AUTHORITY IN SUPPORT OF RESPONDENT'S EXCEPTIONS TO THE DECISION AND
RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ANDREW S. GOLLIN**

Pursuant to National Labor Relations Board Rule § 102.46, Respondent Mike-sell's Potato Chip Co. ("Mike-sell's" or "Company") submits this Brief in Support of its Motion for Leave to File Supplemental Authority in Support of its Exceptions to the Decision and Recommended Order of Administrative Law Judge ("ALJ") Andrew S. Gollin ("Exceptions Brief").¹

As noted in Section IV(A)(3) of the Company's Exceptions Brief, the ALJ relied heavily on *E.I. Du Pont De Nemours*, 364 NLRB No. 113, slip op. at *3-4 (Aug. 26, 2016) in holding that "unilateral, postexpiration discretionary changes are unlawful, notwithstanding an expired management-rights clause or an ostensible past practice of discretionary change developed under that clause." (ALJ Decision, pp. 22, 24 (citing *E.I. Du Pont De Nemours*, 364 NLRB No. 113, slip op. at *3-4 (Aug. 26, 2016)).) The ALJ's reliance on *E.I. Du Pont* was instrumental in causing the ALJ to incorrectly conclude that Mike-sell's was required to bargain with the Union prior to continuing the Company's long-standing practice of

¹ It should be noted that Mike-sell's adamantly maintains its position that the elimination of individual routes—like the closure of discrete business units—is not a mandatory subject of bargaining, so the Company was not required to bargain with the Union over its decision to sell the four routes at issue. (See Exceptions Brief, at Section IV(A)(1-2).) Nevertheless, the Company seeks leave to supplement its alternative argument that, even assuming the sale of routes is a mandatory bargaining subject (which it is not), Mike-sell's made no "material, substantial, and significant change" to drivers' terms and conditions of employment by selling the four routes at issue. (See Exceptions Brief, at Section IV(A)(3).)

selling its sales territory to independent distributors. On December 15, 2017, however, the National Labor Relations Board expressly overturned *E.I. Du Pont*, holding that:

[R]egardless of the circumstances under which a past practice developed—i.e., whether or not the past practice developed under a collective-bargaining agreement containing a management-rights clause authorizing unilateral employer action—an employer’s past practice constitutes a term and condition of employment that permits the employer to take actions unilaterally that do not materially vary in kind or degree from what has been customary in the past.

Raytheon Network Centric Systems, 385 NLRB No. 161, slip op. at *16 (December 15, 2017). The Board further ruled that actions taken consistent with an established practice do not constitute a “change” requiring bargaining merely because they may involve some degree of discretion. *Id.*

As explained in Section IV(A)(3) of its Exceptions Brief, the Company’s decision to sell the four routes at issue was consistent with the parties’ long-standing past practice, the expired labor agreement, the revised final offer implemented upon impasse in June 2013, and a controlling arbitration award. Under *Raytheon*, then—which applies retroactively to all pending cases—Mike-sell’s was entitled to maintain its past practice in determining unilaterally when and which Company routes should be eliminated through their sale to independent distributors, and such conduct did not violate the Act.

Accordingly, under the clear rule of law set forth in *Raytheon*, the Company’s Exceptions should be granted, the ALJ’s Decision should be reversed, and the General Counsel’s Complaint should be dismissed because the record as a whole does not contain a preponderance of evidence that Mike-sell’s violated Sections 8(a)(1) and 8(a)(5) of the Act.

Dated: January 9, 2018

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Jennifer R. Asbrock", written over a horizontal line.

Jennifer R. Asbrock

jasbrock@fbtlaw.com

FROST BROWN TODD LLC

400 West Market Street, 32nd Floor

Louisville, KY 40202-3363

Telephone: (502) 589-5400

Facsimile: (502) 581-1087

Counsel for Respondent Mike-sell's Potato Chip Co.


CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2018, the foregoing was served via electronic filing through the National Labor Relations Board website (www.nlr.gov) to the National Labor Relations Board's Office of the Executive Secretary, located at 1015 Half Street SE, Washington, DC 20570-0001, with additional service copies sent as follows:

Garey E. Lindsay, Regional Director
Linda Finch, Counsel for the General Counsel
National Labor Relations Board Region 9
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271
(via email at Linda.Finch@nlrb.gov)

John R. Doll, Counsel for Charging Party
c/o Doll, Jansen, & Ford
111 W. First St., Suite 1100
Dayton, Ohio 45402-1156
(via email at jdoll@djflawfirm.com)

Office of the General Counsel
c/o National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001
(via U.S. mail)


Jennifer R. Asbrock
Counsel for Respondent Mike-sell's Potato Chip Co.